

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

Upon review of the record the Appeals Board finds that the Order entered by the Administrative Law Judge should be reversed.

Claimant testifies, almost a year after the alleged accidental injury, he injured his low back in the course of his employment on February 9, 1995 as he was getting up from on the ground, apparently pushing or lifting a frame weighing approximately 40 pounds. Claimant testified that he reported the injury to his supervisor, Gary Lubbers, on the following Monday, February 13, 1995, and was given permission to go see a physician at that time. Claimant's version of the events was corroborated by the testimony of his mother. She testified that on that weekend after the injury, claimant told her he had injured himself at work and that he spent most of the weekend applying ice and taking anti-inflammatory medication.

In contrast to claimant's testimony, two of respondent's current employees testified that on Monday, February 13, 1995, claimant advised them he hurt his back over the weekend. Mr. Gary Lubbers also testified that he observed claimant run to his ride on Friday, February 10, after a meeting and, from his observation, claimant had no difficulty doing so. The contemporaneous medical records also contain an inconsistent history of the injury. The first visit was apparently to the chiropractor. The history there is consistent with claimant's testimony in this case and it reflects he injured his back at work. The second visit was to the minor emergency room, also on February 13, 1995. The history there indicates claimant did not know how the injury occurred. Subsequent histories attribute the injury back to a 1987 motor vehicle accident. Claimant testifies he has no idea where this history might have come from because claimant did not give that history. Claimant has also testified that he did not have low back pain prior to this incident of February 9, 1995. He admits to upper, mid back pain but insists that he has not had low back pain. The chiropractic records directly contradict that testimony and reflect low back pain for which he sought and received treatment on numerous occasions in 1993 and 1994. After weighing the evidence and considering the arguments, the Appeals Board has concluded that claimant's evidence fails to meet his burden of showing that the injury, more probably than not, was a result of an accident which arose out of and in the course of his employment with the respondent.

The Appeals Board's decision on this issue renders the notice issue moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Shannon S. Krysl dated February 19, 1996 should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Gary A. Winfrey, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director